

FILED

05/15/2023

Clerk of the  
Appellate Courts

THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
March 7, 2023 Session

**DARIUS ALSTON v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Lauderdale County  
No. 9775 Joe H. Walker III, Judge**

---

**No. W2022-00099-CCA-R3-PC**

---

The Petitioner, Darius Alston, appeals from the Lauderdale County Circuit Court's denial of post-conviction relief from his convictions for two counts of first degree premeditated murder, two counts of first degree felony murder, two counts of especially aggravated robbery, and unlawful possession of a firearm and his sentence of life imprisonment. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his ineffective assistance of counsel claim and that he was prejudiced by the cumulative effect of counsel's multiple instances of deficient performance. We affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Jacob A. Vanzin (on appeal), Nashville, Tennessee, and Chloe Hawkes (at post-conviction hearing), Memphis, Tennessee, for the appellant, Darius Alston.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Ronald L. Coleman, Assistant Attorney General; Mark E. Davidson, District Attorney General; and Julie Pillow, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Petitioner's convictions relate to a September 4, 2011 shooting incident in which Eric Washington and Jonathan Jones sustained fatal wounds. The facts of the case were summarized by this court in the Petitioner's previous appeal:

. . . The defendant and Mr. Washington were cousins and were expected to attend a family barbecue that day until the defendant and his co-defendant, Darius Mitchell, lured the victims to Bethlehem Cemetery where they robbed the victims and shot them multiple times with a 12-gauge shotgun. Both victims died as a result of their injuries. For his participation in the crimes, a Lauderdale County grand jury indicted the defendant for two counts of first degree premeditated murder . . . , two counts of felony murder . . . , two counts of especially aggravated robbery . . . , and unlawful possession of a firearm by a convicted felon . . . . Co-defendant Mitchell was also charged . . . . The defendants were tried jointly.

. . . .

The evidence at trial showed that on September 4, 2011, at approximately 4:00 p.m., Hertha Barlow was driving on Tate Road near Bethlehem Cemetery in Henning, Tennessee, when she came upon a vehicle stopped in the middle of the road with its driver's door open. The roadway was impassable due to the vehicle's position, so Ms. Barlow turned around and called 9-1-1.

Officer Dan Rayner of the Ripley Police Department testified he worked for the Henning Police Department on September 4, 2011, and responded to Ms. Barlow's 9-1-1 call. At 4:09 p.m., Officer Rayner located a vehicle stopped in the middle of Tate Road with its front doors open and the engine running. Officer Rayner looked up the license plate number and discovered the vehicle was registered to Ola Faye Jones, Mr. Jones's mother. When Officer Rayner approached the vehicle, he discovered two men who had been shot to death, sitting in the vehicle's front seats. Mr. Washington was in the driver's seat, and Mr. Jones was in the passenger's seat.

Dr. Marco Ross, an expert in pathology, performed the autopsies of the victims. According to Dr. Ross, Mr. Jones sustained four wounds from a shotgun fired from a distance of three to four feet: two to the head, one to the left shoulder, and one to the left upper arm. Mr. Washington sustained a gunshot to the neck from a shotgun fired from a distance of three to four feet.

. . . .

Nicole Pettigrew, Mr. Washington's girlfriend, testified that she and Mr. Washington were planning to attend a family barbecue on the evening of the murders. Earlier that day, Mr. Washington, the defendant, and co-defendant Mitchell participated in a dice game at Ms. Pettigrew's house. Ms. Pettigrew testified Mr. Washington was involved in selling drugs and always

carried “a good amount of money.” She stated that on the day of the murders, Mr. Washington possessed \$6,000 to \$7,000 in cash which he displayed during the dice game.

Later that afternoon, Mr. Washington was repairing Ms. Pettigrew’s car and needed additional parts for the repair. So, he and Mr. Jones left in Mr. Jones’s car to go to Auto Zone. On the way to Auto Zone, the victims encountered Sammy Haley, Mr. Washington’s father, at Midway Market. Mr. Washington told Mr. Haley he was going to Auto Zone and then to buy a motorcycle with the \$6,500 in cash Mr. Washington had in his pocket.

After seeing the victims, Mr. Haley left Midway Market to go to the family barbecue which was three or four minutes away. As he was leaving, Mr. Haley saw the defendant walking by the road about two hundred yards from Midway Market. Less than an hour later, Mr. Haley was at the family barbecue when he received a phone call informing him something had happened to Mr. Washington near the cemetery. Mr. Haley insisted the defendant did not arrive at the barbecue until after the murders.

Josephine Haley, Mr. Washington’s mother and Mr. Jones’s cousin, testified she attended the family barbecue with Veronica Washington, the defendant’s girlfriend. Mrs. Haley testified that Ms. Washington repeatedly asked her for a ride to Midway Market to get cigarettes for the defendant, who was at “Michelle’s” house. On their way to Midway Market, Mrs. Haley and Ms. Washington saw an ambulance traveling toward the cemetery. After they left the market, Mrs. Haley and Ms. Washington went to Michelle’s house where they gave the cigarettes to the defendant. While there, Mrs. Haley called Mr. Washington repeatedly but he did not answer. She then received a call from her son, Travis, who told her the victims had been in a car accident by the cemetery.

Mrs. Haley went to the scene where she discovered both victims had died. The defendant, who also went to the scene, hugged Mrs. Haley and told her “Goon” killed Mr. Washington. The defendant also stated he would have killed Goon if he had a gun. Mrs. Haley testified that Goon is her cousin and that she did not believe Goon killed Mr. Washington. After Mrs. Haley returned to the barbecue, the defendant arrived wearing a bullet proof vest. Mrs. Haley insisted the defendant had not been at the barbecue until after the murders. She also stated that Ms. Washington’s eagerness to buy cigarettes for the defendant was strange and that it seemed “like [the defendant] was rushing [Ms. Washington] to get me there for an alibi.”

Ola Faye Jones, Mr. Jones's mother, testified she knew co-defendant Mitchell and often saw him with Mr. Jones. She recalled two occasions when co-defendant Mitchell had threatened Mr. Jones. On one occasion, Ms. Jones and Mr. Jones were standing on co-defendant Mitchell's lawn when he threatened to kill Mr. Jones during an argument. On another occasion, Mr. Jones called Ms. Jones and told her that co-defendant Mitchell had pointed a gun at him. Ms. Jones testified that on the day of the murders, she was informed that her vehicle was involved in an incident near the cemetery on Tate Road. When she went to the crime scene, investigators had secured the scene so that she could not get close to her vehicle. Ms. Jones stated she saw the defendant at the crime scene. She noticed that, as the defendant was leaving, he removed a white t-shirt he was wearing and tossed it into a nearby ditch. Ms. Jones collected the t-shirt and gave it to investigators the next day.

Tennessee Bureau of Investigation Special Agent Mark Reynolds, who led the investigation, arrived at the crime scene around 6:00 p.m. on September 4, 2011. He noticed Mr. Washington's pants pockets were pulled inside out as if someone had gone through them, so he collected the pants for DNA analysis. In the car, investigators also located a shotgun shell on the driver's side floorboard and a baseball cap with a large hole on one side and more than half of its bill detached on the passenger's side floorboard. The next day, Agent Reynolds received a white t-shirt that Ms. Jones had recovered near the crime scene and was informed the t-shirt belonged to the defendant. Agent Reynolds submitted all of the evidence from the crime scene, including the t-shirt, to the crime lab for forensic analysis; however, the results were inconclusive.

Agent Reynolds interviewed the defendant in September 2011 at the defendant's aunt's house. The defendant claimed he was at the family barbecue when the murders occurred. Agent Reynolds noted that the defendant was "very nervous" and that his "voice cracked when he tried to talk" during the interview. The defendant "would always kind of repeat the question to [me] before he gave [me] an answer." According to Agent Reynolds, "[t]his is indicative of someone trying to think of something to say or give a correct answer." Agent Reynolds also noted that Ms. Washington was present during the interview and that she "had a look on her face that she knew different of what [the defendant] was telling us." Despite having suspicions the defendant was lying about his whereabouts, Agent Reynolds did not arrest the defendant at that time.

As part of his investigation, Agent Reynolds reviewed surveillance footage from Midway Market which showed the victims at the market on September 4, 2011, at 3:38 p.m. Mr. Washington was seen outside the market talking to Mr. Haley, and Mr. Jones was seen walking out of the market wearing the baseball cap that investigators recovered from the vehicle at the crime scene.

After reviewing the surveillance footage, Agent Reynolds interviewed Mr. Haley. While Agent Reynolds did not disclose the details of their conversation, he testified that Mr. Haley's statement contradicted the defendant's alibi and that the timeline of events provided by Mr. Haley was corroborated by the video footage from Midway Market. Agent Reynolds's interview with Mr. Haley led to the development of co-defendant Mitchell as a person of interest. Agent Reynolds interviewed co-defendant Mitchell but did not obtain information about the murders. Due to insufficient evidence, the case remained unsolved for nearly three years until several inmates, including Terence Scales, Terrance Yarbrough, Mardrakous Sugars, and Marwan Muex, came forward with information.

Terence Scales testified he had been incarcerated with the defendants in federal custody in 2013. During that time, co-defendant Mitchell confessed he had participated in a double murder by the cemetery on Tate Road. Mr. Scales recalled co-defendant Mitchell saying he and an accomplice "set the victims up" by inviting them to the cemetery for a drug transaction and then killed them. After killing the victims, they "took what they wanted to take" and "left [the victims] slump[ed] in the car." According to Mr. Scales, the defendant was present during one of the conversations Mr. Scales had with co-defendant Mitchell about the murders. Mr. Scales stated the defendant expressed he had been disgruntled with Mr. Jones for switching gang affiliation. On October 29, 2014, Mr. Scales sent a letter to the District Attorney's Office reporting his conversations with co-defendant Mitchell and the defendant. Mr. Scales denied receiving a reward in exchange for providing the information.

Terrance Yarbrough testified he had been incarcerated with the defendant in 2013 for about six months to a year. He and the defendant were close friends who spoke daily. According to Mr. Yarbrough, the defendant confided in him after the defendant's mother died of cancer. The defendant told Mr. Yarbrough that he believed his mother's death happened as a result of karma for "what [the defendant] had done." The defendant admitted to Mr. Yarbrough that he and an accomplice, known as "Murder," had "set [the defendant's] cousin up." Mr. Yarbrough testified the defendant named Mr.

Washington, also known as “E-Dubb,” as the cousin whom they had set up. According to Mr. Yarbrough, the defendant rode to the cemetery in the back seat of a vehicle with the victims, who were going to the cemetery for a Vice Lords’ meeting. Mr. Yarbrough testified the defendant had expressed concern that one of the victims’ fathers had seen him enter the vehicle. When they reached the cemetery, the defendant and his accomplice robbed the victims, and the defendant killed Mr. Jones. Mr. Yarbrough stated the defendant admitted he stole less than \$10,000 from the victims. Mr. Yarbrough was also incarcerated with co-defendant Mitchell. During that time, Mr. Yarbrough overheard co-defendant Mitchell tell another inmate that he “did E-Dubb.” According to Mr. Yarbrough, these conversations occurred in 2013. In May 2017, he disclosed the information to authorities but did not receive a reward in exchange for doing so.

Mardrakous Sugars testified he was co-defendant Mitchell’s cellmate in 2013 for about two weeks. During that time, co-defendant Mitchell told Mr. Sugars that he lured the victims to the cemetery where he planned to rob them but the robbery “went bad.” Mr. Sugars stated that co-defendant Mitchell had animosity toward the victims because the victims “wouldn’t give [co-defendant Mitchell] his piece of the pie.” Eight months to a year after learning this information, Mr. Sugars disclosed co-defendant Mitchell’s admissions to law enforcement but did not receive a reward in exchange for doing so.

Marwan Muex testified he and co-defendant Mitchell were cellmates for about a month in late 2013 or early 2014. Co-defendant Mitchell told Mr. Muex that he and his “partner” had tricked the victims into going to the cemetery for a Vice Lords’ meeting. According to Mr. Muex, co-defendant Mitchell claimed he shot the victims because he was jealous that they “had been doing better financially” than him. Mr. Muex stated, “[i]magine he get mad over something like that, what else he’ll do. Just imagine how he got his nickname Murder.” Mr. Muex stated he contacted law enforcement about co-defendant Mitchell’s admissions two to three months before co-defendant Mitchell and the defendant’s trial. He denied receiving a reward in exchange for disclosing the information.

While the defendant chose not to offer any evidence, co-defendant Mitchell testified in his own defense. He testified he was at his house with Jeremy Hurdle when the murders happened. He stated he was standing outside when his police scanner broadcasted a “wreck or something” near the cemetery involving a car registered to Ms. Jones. Co-defendant Mitchell went to the scene where he discovered the victims had been shot to death.

Co-defendant Mitchell insisted that the witnesses who testified against him provided false testimony. He testified Ms. Jones lied when she stated that co-defendant Mitchell threatened to kill Mr. Jones. He also claimed that he did not know any of the inmates who testified and that he was never housed in the same unit as the defendant or Mr. Scales. Co-defendant Mitchell denied being cellmates with Mr. Muex and could not recall being cellmates with Mr. Sugars. He also denied that his nickname was "Murder" or that he was a member of the Vice Lords.

On cross-examination by the State, co-defendant Mitchell acknowledged that in April 2014, he gave a statement to Agent Reynolds at the United States Attorney's Office in exchange for time served on a sentence in an unrelated conviction. In his statement, co-defendant Mitchell stated the defendant had admitted to several people that the defendant murdered the victims. The defendant was given an opportunity to cross-examine co-defendant Mitchell but chose not to do so.

The State presented rebuttal proof wherein both Ms. Jones and Mrs. Haley testified that co-defendant Mitchell's nickname was "Murder" and that Mr. Jones and co-defendant Mitchell were members of the Vice Lords. Mr. Haley also testified that co-defendant Mitchell's nickname was "Murder." In addition, Mr. Haley stated that as he was driving away from Midway Market just moments before the murders, he saw a black truck driving toward the cemetery with Jeremy Hurdle in the passenger's seat. He stated he saw the truck at the same time co-defendant Mitchell claimed to be at his house with Mr. Hurdle.

Agent Reynolds testified he was present for co-defendant Mitchell's statement in April 2014 when co-defendant Mitchell stated that the defendant had admitted to several people that he shot the victims with a 12-gauge shotgun and left the victims at the cemetery. Agent Reynolds testified that this information was consistent with the crime scene and that a 12-gauge shotgun shell was recovered from the scene. He also stated that the crime scene was guarded by investigators and that the caliber of weapon and the nature of the victims' injuries were kept classified. Therefore, according to Agent Reynolds, co-defendant Mitchell could not have known the victims were shot with a 12-gauge shotgun unless he had first-hand knowledge of the murders. The State also introduced a document through Agent Reynolds which verified that co-defendant Mitchell and Mr. Muex were cellmates.

The State also re-called Mr. Sugars and Mr. Muex, who reiterated their previous testimony about their conversations with co-defendant Mitchell. However, upon being re-called, they revealed that co-defendant Mitchell implicated the defendant in those same conversations. Mr. Sugars testified co-defendant Mitchell told him that co-defendant Mitchell and the defendant had planned to rob the victims at the cemetery, but the robbery “end[ed] up going bad.” Mr. Muex testified co-defendant Mitchell admitted he shot the victims at the cemetery and that the defendant was his accomplice. Mr. Muex also testified co-defendant Mitchell is a member of the Vice Lords. Mr. Sugars and Mr. Muex both testified they knew co-defendant Mitchell by the nickname “Murder.”

Following deliberations, the jury found the defendant guilty on all counts as charged. The trial court imposed life sentences for the two first degree murder convictions and the two felony murder convictions. The trial court then merged the two felony murder convictions with the two first degree murder convictions. The defendant also received forty years for each of his especially aggravated robbery convictions, and fifteen years for his unlawful possession of a firearm conviction.

*State v. Darius Markee Alston*, No. W2018-00550-CCA-R3-CD, 2020 WL 1972334, at \*1-5 (Tenn. Crim. App. Apr. 24, 2020), *no perm. app. filed*.

On March 29, 2021, the Petitioner filed a petition for post-conviction relief, alleging multiple allegations of ineffective assistance of counsel. Our review of the evidence presented at the post-conviction hearing is limited to that which is relevant to the ineffective assistance allegations raised on appeal. The Petitioner alleges that counsel provided ineffective assistance by failing to cross-examine the codefendant, failing to request a motion to continue the trial, failing to request a severance, failing to object to alleged prosecutorial misconduct, by failing to obtain a competency evaluation, and by failing to investigate and present alibi witnesses.

At the July 9, 2021 post-conviction hearing, trial counsel testified that he obtained his license to practice law in 1983 and had worked as an assistant public defender since 1993. Counsel stated that his trial experience included more than 100 cases, including an estimated 36 murder trials. He recalled that the Petitioner and Darius Mitchell, the codefendant, who was represented by another attorney, were tried jointly. Counsel recalled that he and the other attorney met a “few times” but that they each received discovery. Counsel said that he contacted the attorney to ensure that he and the attorney received the same discovery materials. Counsel described his relationship with the Petitioner, the codefendant, and the attorney as friendly and amicable. Counsel said that the Petitioner and the codefendant claimed to have no animosity toward each other, that they were

supportive of each other in how they wanted to approach the case, and that each of them were clear they did not want to accept a plea offer. Counsel said that although the Petitioner was not interested in accepting an offer, preliminary negotiations were conducted due to the fact that the case did not involve overwhelming physical evidence. Counsel said that initially the offer was twelve or fifteen years to the first person who accepted it but that ultimately, the Petitioner and the codefendant both had to accept the offer. Counsel stated that he and the Petitioner reviewed the offer, that they discussed the benefits and pitfalls of a trial, and that the Petitioner made an informed decision to proceed to a trial. Counsel said that the Petitioner's loyalty to the Vice Lords played an important factor in the Petitioner's life and his decision-making process. Counsel agreed that the Petitioner's loyalty to the Vice Lords was a hurdle during counsel's representation. Counsel thought that the Petitioner listened to the codefendant more than the Petitioner should have. Counsel said that the codefendant outranked the Petitioner within the Vice Lords but that counsel never thought the codefendant dictated the Petitioner's decisions. Counsel said he did not see any indication that the Petitioner was threatened by the codefendant.

Trial counsel testified that he and the Petitioner met ten to twelve times at a minimum but that he did not maintain records in his case file. Counsel said that he and the Petitioner reviewed the discovery materials, discussed possible defenses, and discussed lesser included offenses. Counsel said that self-defense was not a viable defense because the victims had been ambushed from behind and that a complete denial of culpability was the chosen defense. Counsel recalled that forensic evidence was not obtained in this case, which had been closed for about three years until the codefendant contacted the police and identified the Petitioner as the person who "did it all." Counsel concluded that if the codefendant had not "said anything in federal court and made a statement, [this] case would have probably never been solved." Counsel said that the codefendant made a proffer in federal court and that the codefendant provided facts only the killer or someone who had spoken with the killer would have known. Counsel stated that the codefendant said a 12-gauge shotgun was used during the homicides and that a 12-gauge shotgun shell was found at the crime scene. Counsel noted that the killings occurred in a cemetery, which was an uncommon place to find shotgun shells, and that the shell recovered was likely related to the killings.

Trial counsel testified that the trial tactic was to argue that the codefendant's statements did not implicate the Petitioner and did not show the Petitioner was present. Counsel said that the codefendant had twice threatened to kill one of the victims before the shooting, that the codefendant "pulled a gun" on the victim in front of the victim's mother, and that the codefendant's threats related to the victim's not "cutting [the codefendant] in on the piece of the pie . . . , apparently due to membership" in the Vice Lords. Counsel stated that the Petitioner was "never high ranking, mid ranking officer, low level member if at all" in the Vice Lords.

Trial counsel testified that he and the codefendant's attorney discussed the possibility of filing a severance motion but that the Petitioner and the codefendant did not want to sever their cases because they were "tight-knit or close" and wanted to proceed to trial together. Counsel said that he and the Petitioner discussed whether to sever the cases, that counsel believed the codefendant would have been tried first and convicted if the cases were severed, and that the codefendant would have been more likely to testify that he was not present for the shooting. Counsel said that the Petitioner and the codefendant "appeared to have made a pledge" not to implicate each other in the killings. Counsel said that the Petitioner and the codefendant said they were not going to testify against each other and that, as a result, counsel filed a motion pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), to attempt to limit the State's ability to "get in information." Counsel said that the motion was granted and that statements harmful to the Petitioner and to the codefendant were excluded.

Trial counsel testified that the codefendant's attorney filed a pretrial motion to prohibit testimony that the codefendant's nickname was "Murder." Counsel said that if the codefendant testified, the State would have asked how he received the nickname. Counsel recalled that during the trial, he or the codefendant's attorney objected to a witness' "limited . . . mention" of the nickname. Counsel said that the witness had "not said much" before the objection and that the trial court determined that "it was okay at that point in time. There hadn't been enough to come in front of the jury[.]" Counsel said that the issue was litigated in the appeal of the convictions and that this court determined that "no harm, no foul" resulted. Counsel said that, based upon the witness' statement, the codefendant may have received the nickname as a result of this case.

Trial counsel testified that the bulk of the evidence was against the codefendant but that some evidence implicated the Petitioner. Counsel agreed that the evidence against the Petitioner was based, in large part, upon the testimony of federal inmate Terrance Yarbrough, who testified that the Petitioner feared Mr. Haley saw the Petitioner "get in the car" and upon the testimony of Mr. Haley, who was Mr. Washington's father and who saw the Petitioner on the "rock road by the railroad overpass" close to the time Mr. Haley saw Mr. Washington drive away for the last time. Counsel said that although he knew the testimony from Mr. Yarbrough and Mr. Haley would be presented at the trial, counsel's trial strategy was that the Petitioner benefited from the fact that most of the evidence implicated the codefendant. Counsel said that the jury could determine that the codefendant was the "really bad guy" and question whether the Petitioner was involved. Counsel said he thought the Petitioner would be "much better off having [the jury] see" the codefendant. Counsel said that this strategy had been successful previously and that "reasonable doubt would certainly have been there." Counsel said that even if the jury believed the shooting was gang-related, the proof only showed that the Petitioner was merely present, not that the Petitioner knew a robbery would occur.

Trial counsel testified that before the trial, he investigated the Petitioner's mental health. Counsel said that he first met the Petitioner at a facility in North Carolina where the Petitioner was undergoing a forensic evaluation to determine whether he was competent to stand trial in federal court for pending drug-related charges related to the Vice Lords. Counsel said that he obtained all of the records related to the evaluation, that the Petitioner was deemed competent to stand trial, and that the medication regime established when the Petitioner was in federal custody appeared to help the Petitioner. Counsel recalled that the Petitioner entered a guilty plea in federal court. Counsel said that he and the Petitioner had a good relationship and communicated well and that the Petitioner understood their discussions.

Trial counsel testified that during the trial, the Petitioner and the codefendant interacted more amicably and friendly than counsel had hoped. Counsel said that the codefendant passed handwritten notes to the Petitioner and that counsel thought this showed they were "somehow tied together." Counsel said that stopping them would have drawn attention to the notion they were "putting their heads together."

Trial counsel testified that after the State's case-in-chief, the codefendant had "a change of heart" and decided to testify. Counsel said that until the codefendant elected to testify, counsel and the codefendant's attorney had been certain the codefendant would not testify. Counsel said that the codefendant's testimony would not have benefited the codefendant or the Petitioner because the State would have emphasized the codefendant's statement implicating the Petitioner, the State would have questioned the codefendant about his nickname, the codefendant had previous convictions, and the codefendant had credibility issues. Counsel said that the Petitioner, likewise, had previous convictions.

Trial counsel testified that during a break in the trial, the codefendant's father, whom counsel had represented previously, spoke to counsel. Counsel stated that the codefendant's father said the codefendant did not need to testify and asked counsel to tell the codefendant that the codefendant's father agreed with counsel that the codefendant should not testify. Counsel said that, at the request of the codefendant's attorney, counsel spoke with the codefendant. Counsel said that he, the codefendant, and the codefendant's attorney spoke, that counsel told the codefendant that he represented the Petitioner, and that the codefendant's decision whether to testify impacted the Petitioner. Counsel said he told the codefendant that his police statement put the Petitioner's "neck in a noose more or less," that the State would question the codefendant about his statement, and that the State would "get into issues" counsel did not think the codefendant could handle. Counsel said that the codefendant's attorney asked the codefendant what he wanted to say that would impact the case and that the codefendant replied he needed to tell his side of the story. Counsel said despite his and the codefendant's attorney's best efforts, the codefendant testified.

Trial counsel testified that he considered requesting a severance based upon the codefendant's decision to testify. Counsel said, though, that he still believed it was in the Petitioner's best interest for the jury to have "the bad guy" sitting at the defense table. Counsel said that he knew the codefendant would "make a fool of himself" and recalled that the codefendant disputed one of the witnesses' having been the codefendant's cellmate when prison records reflected otherwise. Counsel said that the codefendant looked untruthful, which counsel concluded bolstered the Petitioner's credibility. Counsel said that if he had requested and had been granted a severance at the close of the State's proof, the codefendant's trial would have continued without the Petitioner and that the codefendant would have most likely testified against the Petitioner at a new trial. Counsel said he was concerned that a severance might have made the State's case stronger against the Petitioner.

Trial counsel testified that he was "blind-sided" by the codefendant's decision to testify. Counsel explained that he had been led to believe the codefendant would not testify. Counsel said, though, he was not blind-sided "such that if I knew he was going to testify." Counsel said, "I wouldn't say I wasn't expecting it." Counsel stated that he was more disappointed in how damaging the codefendant's testimony might be to the Petitioner and that it was always a possibility that the codefendant might testify. Counsel said that his best tactic was to have the codefendant in the courtroom and for the jury to see the codefendant's "true colors."

Trial counsel testified that he did not consider this case to be complex and that the case involved two homicide victims with no physical evidence and no expert testimony. Counsel said that he considered the testimony "suspect" from the "snitches" because they waited years to tell the authorities about their conversations and that he and the codefendant's attorney each established on cross-examination that the witnesses lacked credibility.

Trial counsel testified that the Petitioner could not establish an alibi for the time of the shooting. Counsel recalled that the Petitioner had been at a family barbeque but that the gathering did not coincide with the time of the homicides. Counsel agreed that a woman going to the cemetery where the shooting occurred saw a car and reported the car to the police, that the bodies were later discovered, and that nobody knew how long the car and the bodies had been there before the woman called the police.

On cross-examination, trial counsel testified that he considered, as "a passing thought," requesting a continuance after the codefendant decided to testify but that he wanted the codefendant in front of the jury. Counsel said that he wanted the jury to see the evidence against the codefendant and to determine that the codefendant was the ringleader.

Trial counsel testified that he filed a pretrial motion to exclude extrajudicial statements in anticipation of the codefendant's not testifying. Counsel said that part of his strategy was built around the codefendant's not testifying but that his strategy also included limiting the amount of admissible proof during the State's case-in-chief. Counsel said that he was seventy-five percent certain the codefendant would not testify based upon statements from the codefendant and his attorney. Counsel said, though, that it was always possible that the codefendant would elect to testify. Counsel said that the codefendant's nickname tended to implicate the codefendant more than the Petitioner.

The Petitioner testified that he and trial counsel discussed a motion to sever the cases and that the Petitioner did not think there was a need to separate the cases because he and the codefendant were "going to court at the same time, and they saying that they had placed us at the scene of the crime or whatnot." The Petitioner said that although he was "happy" with counsel's representation, his issue was "just the part about the stand, about the part of [the codefendant] getting up on the stand." The Petitioner recalled that he and counsel discussed severing the cases after the codefendant testified.

The Petitioner testified that although he had "nothing bad" to say about trial counsel, he felt "like things could have been done a little bit better." The Petitioner expressed dislike for his sentence and said that he did not present a proffer against the codefendant and that he "knew something wasn't going to go right, but I didn't know that I was going to end up with 65- to 100-and-something years, you know." He said that he did not understand the sentence he received for something he did not do.

Upon this evidence, the post-conviction court denied relief. The court determined that the Petitioner failed to establish his ineffective assistance of counsel claim by clear and convincing evidence. The court found that trial counsel and the Petitioner met about twelve times before the trial, reviewed the discovery materials, and discussed possible defenses. The court found that the codefendant made a proffer to gain favor with federal authorities, that the proffer contained specific facts known only by someone who was at the shooting, that the proffer implicated the Petitioner and the codefendant, and that the proffer provided motive and knowledge about the shotgun and sequence of events.

The post-conviction court found that trial counsel and the Petitioner discussed seeking a severance but that the Petitioner wanted a joint trial with the codefendant. The court found that counsel made a strategic decision not to seek a severance before the trial. The court found that counsel and the Petitioner discussed unfavorable evidence from a jail informant and from Mr. Haley and that the defense strategy was to present the jury with a codefendant who was more guilty and to argue that the proof against the Petitioner was "poor."

The post-conviction court found that the Petitioner's mental health was assessed by federal authorities and that the Petitioner was determined to be competent to stand trial. The court found that trial counsel obtained the reports and discussed them with the Petitioner.

The post-conviction court found that trial counsel and the Petitioner knew the codefendant might testify at the trial, although counsel believed the testimony would not benefit the codefendant. The court found that counsel was not surprised by the codefendant's decision to testify and was prepared for cross-examination. The court found that after the close of the State's proof, counsel and the Petitioner, again, discussed seeking a severance. The court found that counsel made a tactical decision to proceed with the joint trial because if a severance were granted, the codefendant could have later testified against the Petitioner, which would have made the State's case stronger against the Petitioner.

The post-conviction court determined that trial counsel and the Petitioner discussed all plea offers but that the Petitioner was loyal to the Vice Lords and outranked by the codefendant. The court found that the defense attempted to develop an alibi defense with a family barbeque and that the evidence was presented to the jury.

Relative to the State's witnesses' mentioning the codefendant's nickname, Murder, the post-conviction court determined that many nicknames were used during the trial and that Mr. Yarbrough, a federal inmate, testified that the Petitioner confided that the Petitioner and his accomplice, Murder, "set his cousin up." The court noted that in the Petitioner's previous appeal, this court determined that the Petitioner was not unfairly prejudiced by the use of the codefendant's nickname because it was relevant to the name by which some of the trial witnesses knew the codefendant, the nickname only referred to the codefendant, and most of the references to the nickname were to rebut the codefendant's testimony that Murder was not his nickname.

Relative to severance, the post-conviction court determined that the joint trial and the decision not to seek a severance did not affect the Petitioner's right to a fair trial because the same evidence at the joint trial would have been admissible at a separate trial. The court found that even if trial counsel had filed a motion to sever the trials, the trial court most likely would have denied the motion because the Petitioner was being prosecuted under a theory of criminal responsibility for the actions of the codefendant. The post-conviction court found that counsel made a strategic decision not to seek a severance before and during the trial. The court found, as well, that the Petitioner failed to show that counsel would have benefited from a continuance before cross-examining the codefendant. The court found that counsel was familiar with the statements the codefendant made to witnesses and filed a *Bruton* motion relative to the testimony. The court determined that counsel was prepared for cross-examination. This appeal followed.

## I. Ineffective Assistance of Counsel

The Petitioner contends that the post-conviction court erred by denying relief on his ineffective assistance of counsel claim. The State responds that the court did not err by denying relief. We agree with the State.

Post-conviction relief is available “when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court’s findings of fact are binding on appeal, and this court must defer to them “unless the evidence in the record preponderates against those findings.” *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); see *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused’s right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. “[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies “if the choices are informed . . . based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*,

466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

#### **A. Cross-Examination of the Codefendant**

The Petitioner argues that trial counsel provided ineffective assistance by failing to conduct any cross-examination of the codefendant.

The trial transcript reflects that the codefendant denied any involvement in the shooting and insisted that the prosecution’s witnesses had lied. The codefendant denied being a member of the Vice Lords and having the nickname Murder. On cross-examination by the State, the codefendant acknowledged that he provided a statement to federal authorities and that he stated the Petitioner had admitted to multiple people that the Petitioner killed the victims. Trial counsel did not cross-examine the codefendant. *See Darius Markee Alston*, 2020 WL 1972334, at \*4.

The record, likewise, reflects that trial counsel was not asked at the post-conviction hearing about his decision not to cross-examine the codefendant. Further, the Petitioner failed to call the codefendant as a witness at the post-conviction hearing in order to establish what evidence trial counsel could have elicited if counsel had cross-examined the codefendant at the trial. This court is not permitted to speculate. *See Black v. State*, 749 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The Petitioner merely asserts that counsel “should have challenged” the codefendant’s testimony and “made the point to [the] jury that the evidence against [the Petitioner] paled in comparison” to the evidence against the codefendant.

The post-conviction court determined that trial counsel was prepared for the possibility that the codefendant would decide to testify and for cross-examination, and the record does not preponderate against those determinations. Counsel testified that he was seventy-five percent certain the codefendant would not testify but that he knew it was always possible the codefendant would choose to testify, and, as a result, he was not blindsided by the codefendant’s decision to testify. We note that aside from the codefendant’s testimony regarding the statement in which the codefendant implicated the Petitioner, other evidence at the trial incriminated the Petitioner in connection with the robberies and the killings. Mr. Yarbrough testified that the Petitioner admitted that (1) the Petitioner and the codefendant set up Mr. Washington, who was the Petitioner’s cousin, (2) the Petitioner and the codefendant robbed the victims, (3) the Petitioner killed Mr. Jones, and (4) the Petitioner took less than \$10,000 from the victims. Mr. Scales testified that the Petitioner had been disgruntled about Mr. Jones’s changing gang affiliations. On rebuttal, Mr. Sugars and Mr. Muex each testified that the codefendant and the Petitioner planned to rob the victims at the cemetery but that the robbery went awry. As a result, the record supports the post-conviction court’s determinations that the Petitioner failed to establish

counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

## **B. Motion to Continue**

The Petitioner argues that trial counsel provided ineffective assistance by failing to request a continuance in order to prepare to cross-examine the codefendant.

The record reflects that trial counsel considered requesting a continuance as “a passing thought” after the codefendant decided to testify but that he wanted the codefendant in front of the jury. Counsel wanted the jury to see the codefendant’s “true colors.” Counsel said that he wanted the jury to see the evidence against the codefendant and to determine that the codefendant was the ringleader. Counsel said that his strategy was to show the jury that most of the evidence implicated the codefendant, which benefited the Petitioner. Counsel’s strategy was to show the jury that the codefendant was the “really bad guy” and to make the jury question whether the Petitioner was involved. Counsel determined that the Petitioner benefited from having the jury see the codefendant, which had previously been a successful strategy for counsel.

Furthermore, the post-conviction court determined that trial counsel was prepared for cross-examination and that the Petitioner failed to show that counsel would have benefited from a continuance before cross-examination, and the record does not preponderate against these determinations. Counsel was knowledgeable about the codefendant’s previous statement to federal authorities implicating the Petitioner and was prepared for the codefendant’s testimony, and based upon counsel’s decision not to question the codefendant, the record supports the post-conviction court’s determinations that the Petitioner failed to establish counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

## **C. Motion to Sever**

The Petitioner argues that trial counsel provided ineffective assistance by failing to request a severance when the codefendant decided to testify at the trial.

The record reflects that trial counsel and the Petitioner discussed whether to seek a severance before the trial began and after the codefendant elected to testify. The Petitioner confirmed during his post-conviction testimony that he and counsel discussed whether to seek a severance in light of the codefendant’s decision to testify. Counsel believed that if the cases had been severed before the trial, the codefendant would have been tried and convicted first and that the codefendant would have likely testified later against the Petitioner. After the codefendant elected to testify at the trial, counsel considered requesting a severance. However, counsel determined that it was in the Petitioner’s best

interest for the jury to observe the codefendant because the codefendant was “the bad guy” and because the codefendant would “make a fool of himself” by testifying, which benefited the Petitioner. Counsel thought that the codefendant presented as untruthful, which likewise benefited the Petitioner. Furthermore, counsel believed that if he had requested and had received a severance, the State’s case would have been much stronger against the Petitioner at a separate trial. The record reflects that counsel made a strategic decision not to seek a severance, and the record supports the post-conviction court’s determinations that the Petitioner failed to establish counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

#### **D. Prosecutorial Misconduct**

The Petitioner argues that trial counsel provided ineffective assistance by failing to object to alleged prosecutorial misconduct when the prosecutor used the codefendant’s nickname, Murder. He likewise asserts that the post-conviction court erred by determining that the prosecutor did not engage in misconduct by referring to the codefendant by his nickname.

At the trial, multiple witnesses referred to the codefendant by his nickname. Mr. Yarbrough testified that the Petitioner admitted he and an accomplice, Murder, killed the victims after luring them to the cemetery. Mr. Muex testified, “just imagine” how codefendant Mitchell received the nickname Murder. The remainder of the references to the codefendant’s nickname occurred after the codefendant elected to testify. Counsel testified at the post-conviction hearing that he or the codefendant’s attorney objected to the references but that the nickname tended to implicate the codefendant, not the Petitioner. This court determined that appellate consideration of the issue was waived because the Petitioner failed to object. This court further determined that, in any event, the Petitioner failed to establish that he was unfairly prejudiced by the references to the codefendant’s nickname, concluding that the nickname was “relevant because it was the name by which several witnesses” knew the codefendant, that “most references” were admitted on rebuttal after the codefendant testified that his nickname was not Murder, and that the nickname did not refer to the Petitioner. *See Alston*, 2020 WL 1972334, at \*8. The record supports the post-conviction court’s determinations that the Petitioner failed to establish counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

#### **E. Petitioner’s Mental Health**

The Petitioner argues that trial counsel provided ineffective assistance by failing to obtain a competency evaluation “after one had been ordered by the Court” and by failing to present evidence of the Petitioner’s mental health issues at the trial.

The record reflects that before the trial, trial counsel investigated the Petitioner's mental health. Counsel first met the Petitioner when he was confined in North Carolina in connection with unrelated federal charges. At this time, the Petitioner underwent a forensic evaluation to determine whether he was competent to stand trial in federal court. He was determined to be competent, and trial counsel obtained all of the relevant records. The Petitioner subsequently entered a guilty plea in federal court. Counsel noted that the medication regime established while the Petitioner was in federal custody helped the Petitioner. Counsel was not questioned at the post-conviction hearing about the evaluator's conclusions or the contents of the reports, and the reports were not received as an exhibit.

The Petitioner asserts for the first time on appeal that the trial court ordered a competency evaluation in addition to the evaluation in federal court and that the trial court record does not contain an evaluation report related to the court's order. Our review of the trial court record reflects that an evaluation was ordered by the court on January 24, 2017, but that the results of any evaluation are not contained in the record. In any event, trial counsel was not questioned about the order, whether the Petitioner was subsequently evaluated, and about the results of any evaluation. Likewise, the Petitioner did not present any mental health evidence at the post-conviction hearing. This court will not speculate about what any mental health evidence might show. *See Black*, 749 S.W.2d at 757. As a result, the record supports the post-conviction court's determinations that the Petitioner failed to establish counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

#### **F. Alibi Witnesses**

The Petitioner argues that trial counsel provided ineffective assistance by failing to investigate and present alibi witnesses.

During the pendency of this appeal, the Petitioner filed a motion to hold this appeal in abeyance pending the outcome of a petition for a writ of error coram nobis, which alleged that two witnesses possessed alibi testimony in favor of the Petitioner. Notably, the Petitioner asserted that Michelle and Marvin Johnson, the Petitioner's aunt and uncle, executed affidavits establishing the Petitioner's alibi. The Petitioner asserts that this alleged new evidence was discovered after the post-conviction court denied relief. This court denied the Petitioner's request to hold this appeal in abeyance pending the outcome of the coram nobis proceedings. *See Darius Alston v. State*, No. W2022-00099-CCA-R3-PC (Tenn. Crim. App. Sept. 27, 2022) (order).

In any event, trial counsel testified that the Petitioner could not establish an alibi for the time of the shooting, although the Petitioner had been at a family barbeque at some point on the day of the shooting. Counsel recalled that the time of the family gathering did not coincide with the time of the homicides and noted that nobody knew how long the

victims' bodies had been at the crime scene when Ms. Barlow reported the car at the cemetery. Counsel was not questioned at the post-conviction hearing about his specific efforts to investigate a possible alibi, and the Petitioner did not present any potential alibi witnesses. This court will not speculate about the nature of any evidence which was not presented at the post-conviction hearing. *See Black*, 749 S.W.2d at 757. Further, Agent Reynolds testified at the trial that Mr. Haley's statement contradicted the Petitioner's alibi and that the timeline provided by Mr. Haley was corroborated by the video surveillance from the market before the shooting. As a result, the record supports the post-conviction court's determinations that the Petitioner failed to establish counsel provided deficient performance and that any deficiency resulted in prejudice. The Petitioner is not entitled to relief on this basis.

## II. Cumulative Error

The Petitioner argues that he is entitled to relief because he was prejudiced by the cumulative effect of trial counsel's multiple instances of deficient performance.

The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

"[W]hen an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice" of an ineffective assistance of counsel allegation. *Timothy Terrell McKinney v. State*, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at \*37 (Tenn. Crim. App. Mar. 9, 2010), *perm. app. denied* (Tenn. Aug. 25, 2010). More than one instance of deficient performance, when considered collectively, can result in a sufficient showing of prejudice pursuant to *Strickland*. *Id.* The question is whether counsel's deficiencies "cumulatively prejudiced . . . the right to a fair proceeding and undermined confidence in the outcome of the trial." *Id.* Counsel's failure to conduct adequate pretrial preparation and investigation may establish prejudice pursuant to *Strickland*. *Id.*

The Petitioner failed to establish deficient performance by trial counsel. Therefore, the Petitioner has failed to establish multiple deficiencies from which this court might grant relief on the basis of prejudice resulting from the cumulative effect of the alleged deficiencies.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

---

ROBERT H. MONTGOMERY, JR., JUDGE